NO. 82619-6

SUPREME COURT OF THE
STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF
SHAWN FRANCIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bruce W. Cohoe

No. 95-1-05023-1

Supplemental Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Do convictions for attempted first degree robbery and assault in the second degree – deadly weapon, violate double jeopardy where the two convictions are identical neither in fact or law?

2. Do convictions for attempted first degree robbery and murder in the first degree – felony murder (with the predicate crime of attempted robbery) violate double jeopardy where the two convictions are based on an attempted robbery of two different persons?

3. Whether a defendant may intelligently and voluntarily waive a double jeopardy objection to crimes charged for a guilty plea as a result of plea negotiations?

4. Whether such a waiver must be explicit or on the record?

5. Whether the defendant implicitly waives a double jeopardy objection by the affirmative act of participating in and receiving a benefit through plea negotiations?

B. STATEMENT OF THE CASE.

The State incorporates the statement of the case, with references to appendices, in the State's Response to the Petition in the Court of Appeals.

C. ARGUMENT.

1. DEFENDANT'S CONVICTIONS FOR ATTEMPTED ROBBERY AND ASSAULT IN THE SECOND DEGREE DO NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES WHERE THE SUBSTANTIAL STEP TO COMMIT THE CRIME OF ATTEMPTED ROBBERY IS NOT FACTUALLY THE SAME AS THE ASSAULT. THE TWO CONVICTIONS ALSO HAVE DIFFERENT LEGAL ELEMENTS WHERE THE ASSAULT IN THE SECOND DEGREE IS A DEADLY WEAPON CHARGE AND NOT A BODILY HARM CASE.

The charges in this case do not violate double jeopardy because they fail the test under ***Blockburger v. United States***, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed 2d. 306 (1932). This issue has been adequately briefed in the State's response to the PRP in the Court of Appeals. For the sake of brevity and to avoid repeating the argument, the State incorporates its Court of Appeals brief by reference.

2. DEFENDANT'S BARGAINED FOR GUILTY PLEA IMPLICITLY WAIVED THE DOUBLE JEOPARDY ARGUMENT BEFORE THE COURT.

a. The plea waived any constitutional violations that occurred before the plea.

A valid plea waives or renders irrelevant all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to the government's legal power to prosecute regardless of factual guilt. *See* ***Menna v. New York***, 423 U.S. 61, 63 n. 2,

96 S. Ct. 241, 46 L.Ed.2d 195 (1975). The guilty plea also waives "constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers". ***State v. Knight***, 162 Wn. 2d 806, 811, 174 P.3d 1167 (2008)(internal cite omitted).A guilty plea that is entered voluntarily and intelligently is not subject to collateral attack. ***Broce v. United States***, 488 U.S. 563, 569, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989); ***State v. Knight***, 162 Wn. 2d at 811.

b. A defendant can implicitly or explicitly waive double jeopardy in the context of a guilty plea.

In the context of a guilty plea, or plea bargain, a defendant may intelligently and voluntarily waive his right against double jeopardy. ***Ricketts v. Adamson***, 483 U.S. 1, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987). Waiver of the double jeopardy issue need not be explicit or in writing. It may occur through the defendant's affirmative acts. ***Jeffers v. United States***, 432 U.S. 137, 153, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977). It may be implied in the terms of an otherwise explicit plea agreement. ***Ricketts***, 483 U.S., at 9.

In ***Ricketts***, the defendant (Adamson) and two others were charged with murder for the assassination of a reporter in Arizona. In exchange for a plea to reduced charges and a reduced sentence, the defendant agreed to

testify against co-defendants. He testified in the trial and the codefendants were convicted. Adamson was sentenced and sent to prison. When the co-defendants convictions were reversed on appeal, he refused to testify at the retrial. The State found him in breach of the agreement and recharged him with capital murder. He objected, arguing that double jeopardy prevented his re-prosecution. The court denied his double jeopardy motion. He was convicted and sentenced to death.

In ***Ricketts***, the Supreme Court considered the explicit language of the plea agreement. The agreement said that the parties would return to *status quo ante* in the event of breach. The Court held that although double jeopardy was not mentioned or waived by name, the terms implied the waiver as necessary to the agreed consequences. ***Ricketts***, at 9-10. The Court went on to say that "the Double Jeopardy Clause ... does not relieve a defendant from the consequences of his voluntary choice." *Id.*, at 11, *quoting* ***United States v. Scott***, 437 U.S. 82, 99, 98 S. Ct. 2187, 57 L.Ed.2d 65 (1978).

In ***Jeffers***, the defendant was charged with conspiring with co-defendants to distribute narcotics and was charged with running a continuing criminal enterprise. He would have been able to challenge the successive prosecutions for arguably one conspiracy or an ongoing criminal enterprise; however, he requested separate trials for strategic

reasons. He got separate trials and was convicted in each. The Supreme Court held that because he was responsible for the successive trials, he waived his double jeopardy objection. ***Jeffers***, 432 U.S., at 154.

Here, as in ***Jeffers***, the defendant waived the double jeopardy objection through an affirmative act: he bargained for a reduction in the number and level of charges, resulting in a lower offender score and shorter sentence. He could have objected, at the time of the plea, to the charges and raised the same double jeopardy arguments he now asserts. If double jeopardy was a *bona fide* concern, the parties could have negotiated a plea to other charges to satisfy his concerns, or the case could have proceeded to trial on the original charges. "[He] chose not to and hence, relinquished that entitlement." *See*, ***Broce***, 488 U.S., at 571.

The Washington Supreme Court has acknowledged that a defendant's participation in a negotiated plea can waive a double jeopardy objection to the amended charges. ***State v. Shale***, 160 Wn. 2d 489, 501-502, 158 P.3d 588 (2007), concurring opinion by Justice Madsen, joined by Justices Alexander, Fairhurst, and Bridge. There, citing ***Jeffers*** and ***Scott***, Justice Madsen concluded that Shale waived his double jeopardy objection to the charges because he actively participated in the plea bargaining in order to preserve a potential benefit at sentencing; a first time offender waiver. *Id.*, at 501-502.

Here, the defendant was originally facing charges of murder in the first degree, assault in the first degree, and attempted robbery in the first degree (2 counts). (Appendix C – Amended Information). Conservatively, if the court counted at least two of the other current offenses in each offender score calculation, defendant's standard range sentence for murder would jump from 261-347, to 281-374, and on the assault charge from 12-14 months, to 129-171 months, and the robbery from 40 ½ to 51-68 months. (*See* 1995 Sentencing Guideline Commission Sheets – Appendix E).

The State agreed to reduce the charges to murder in the first degree, assault in the second degree, and attempted robbery in the first degree, upon consideration that defendant would plead guilty to those charges. Having entered into this bargain with the State, and the double jeopardy argument not being obvious on the face of the judgment (*See* argument incorporated regarding "substantial step" facts), the defendant should be bound to the agreement entered with the State and has waived any double jeopardy argument.

c. <u>The State had the constitutional power and authority to charge the crimes that the petitioner pleaded guilty to</u>.

The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. ***State v.***

Freeman, 153 Wn. 2d 765, 770, 108 P.3d 753 (2005); ***State v. Michielli***, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). But it may not do so if it violates the "unit of prosecution" rule. In the former instance, a double jeopardy objection may only be raised after conviction or sentencing. In the latter, the objection can be to the charging document itself or the power of the State to "hale the defendant into court". ***State v. Knight***, 162 Wn. 2d 806, 811, 174 P.3d 1167 (2008), citing ***Menna***, 423 U.S., at 62.

Knight noted that claims which go to "the very power of the State to bring the defendant into court to answer the charge brought against him" are not waived by guilty pleas. 162 Wn. 2d at 811, citing ***Blackledge v. Perry***, 417 U.S. 21, 30, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974). The violation in ***Blackledge*** is one of due process, not double jeopardy. *Id.*, at 25, 30. The issue there was whether the State had violated the defendant's due process rights by charging him with a more serious crime when he appealed a conviction.

The defendant in ***Blackledge***, Perry, was charged with misdemeanor assault in North Carolina district court from a fight in prison. After he was convicted at trial, he filed an appeal in Superior Court. Because the appeal was a trial *de novo*, the State filed a new felony charge of aggravated assault, based upon the same incident. The defendant pleaded guilty as charged. He later filed a writ of *habeas corpus* alleging

violations of double jeopardy and due process and arguing that the state was essentially punishing him for exercising his right to appeal. The Supreme Court held that:

> Having chosen originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court.

Id., at 30.

Blackledge and ***Menna*** do not involve the issue of whether a plea agreement explicitly or implicitly waived a constitutional right. Menna had been punished by the court via contempt for refusing to testify at a grand jury proceeding. He was then charged with a crime for the same act. ***Menna***, 423 U.S., at 61. Unlike the defendants in ***Jeffers***, ***Broce***, and ***Ricketts***, Menna and Perry pleaded as charged. They did not bargain for a benefit and then collaterally attack the conviction. The State was prohibited from bringing them into court for reasons other than charging language or multiplicity of counts charged. Therefore, ***Blackledge*** and ***Menna*** are of limited applicability in the present case.

As ***State v. Amos***, 147 Wn. App. 217, 227, 195 P.3d 564 (2009) points out, a "same offense" double jeopardy case is different from a "unit

of prosecution" double jeopardy case. The analyses are different. The potential objections and consequences are different.

The double jeopardy clause offers a number of different constitutional protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

State v. Gocken, 127 Wn. 2d 95, 100, 896 P.2d 1267 (1995), quoting ***North Carolina v. Pearce***, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). Some applications, such as the protection against second prosecutions, prevent the government from charging a crime at the outset. Where the government charges multiple crimes arising from one criminal act, a "unit of prosecution" violation can prevent the government from charging multiple crimes. In a "same offense" case, the crimes may be charged, but only one punishment imposed. *See*, ***Amos***, *supra.*

State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998) discussed the difference in the two principles when establishing the "unit of prosecution" analysis. When a defendant is convicted for violating one statute multiple times, the inquiry is what unit of prosecution the legislature intended to punish. *Id.*, at 634. The consequences of the two principles are different. A "unit of prosecution" issue limits the power of

the State to charge counts. The defendant may move to dismiss counts in the charging document before trial begins.

Under a "same offense" analysis, the State may charge offenses under different statutes. ***Amos***, 147 Wn. App. at 227, citing ***Freeman***, 153 Wn. 2d, at 770. The case goes to the jury. The defendant cannot have the counts dismissed before trial. The principle limits the State's power to punish for one act. *Id.* The present case is a "same offense" case, according to the petitioner. Under the appropriate "same offense" analysis, the State had the power to charge the crimes as it did. The charging document was valid on its face.

In ***State v. Martin***, 149 Wn. App. 689, 205 P.3d 931 (2009), the Court of Appeals considered another "same offense" case. The Court acknowledged that the State could charge the crimes, per ***Freeman***, *supra*. However, under a broad reading of ***Knight***, *supra,* the Court found that the bargained for plea did not waive the double jeopardy objection. ***Martin***, at 698. ***Martin*** seems to conclude that, even though the State had the power to prosecute, the plea did not waive any "constitutional violations that occurred before the plea except those related to the circumstances of the plea or the government's legal power to prosecute". ***Menna***, 423 U.S. at 63 n. 2. ***Martin*** seems to apply ***Knight*** as a blanket rule, instead of distinguishing between different principles of double jeopardy as applied

to the State's power to charge. ***Martin*** also implies that because the prosecutor decides on the charges and is party to the agreement, that a plea agreement waiver of double jeopardy must be explicit. ***Martin***, at 697, n. 32. *Contra* ***Ricketts*** and ***Jeffers***.

The question in such circumstances is not whether the principle of double jeopardy is implicated. It is. It is not whether the defendant can waive it. He can. It is whether the defendant has waived the objection either implicitly or explicitly.

Where a defendant participates in a knowing, voluntary plea agreement where he receives a benefit, he necessarily waives a double jeopardy objection. As in ***Ricketts***, it is part of the deal. Otherwise, as the Court pointed out in ***Amos***, at 227:

> A contrary holding would reward defendants who manipulate and mislead courts. Such a ruling would allow a defendant to mislead the court by requesting the filing of an amended information, enter a guilty plea to the amended charge and then, without withdrawing his plea, challenge the trial court's ability to hold him accountable on the charges to which he pleaded guilty.

Part of a plea agreement is finality of judgment. If a defendant can enter and benefit from an agreed plea, and later collaterally attack the charges on double jeopardy grounds, the agreement is an illusory promise. There is no agreement.

Permitting this strategy also allows the defendant to invite error. If a defendant has a *bona fide* objection to the bargained for charges, based on double jeopardy, he must raise it in the trial court so that it may be addressed there.

The petitioner in the present case participated in and benefited from a plea agreement. The state reduced charges in exchange for his plea. The amended charges reduced the petitioner's sentence and offender score. The agreement implicitly included a waiver of a double jeopardy objection to the charges.

D. CONCLUSION.

The offenses charged in the Amended Information do not violate the principles of double jeopardy. If there were double jeopardy issues regarding the charges, the petitioner waived the objection by participating in and benefiting from the plea agreement.

The State respectfully requests that the petition be dismissed and the conviction affirmed.

DATED: September 8, 2009.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Please see attached the State's Supplemental Brief in the below referenced matter:

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